

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

October 23, 2009

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.:09KD-113

STATEWIDE

Authorization to Enter Into a Memorandum of Agreement Between  
the Department of Land and Natural Resources and the  
Department of Agriculture on Behalf of the Aquaculture  
Development Program

APPLICANT:

Department of Land and Natural Resources on behalf of the Land  
Division

Department of Agriculture on Behalf of the Aquaculture  
Development Program

LEGAL REFERENCE:

Sections 171-6, Hawaii Revised Statutes, as amended.

BACKGROUND:

Article XI of the Constitution of the State of Hawaii relating to the conservation, control, and development of resources, provides in section 6 that the State shall have the power to manage and control the marine, seabed, and other resources located within the boundaries of the State, including its archipelagic waters, and reserves to the State all such rights outside state boundaries not specifically limited by federal or international law.

In 1986, the State Legislature created the Ocean and Submerged Lands Leasing Act, chapter 190D, HRS. Global development of open ocean aquaculture technology had evolved rapidly and commercial systems were readily available for use in both nearshore and offshore applications. Open Ocean aquaculture was being carried out successfully, profitably and sustainably in many areas of the world, including Scandinavia, South America, Asia and the United States. For example, offshore culture technologies were being used for: salmon in Norway, Chile and the United States; pearl oysters in several South Pacific island countries; bluefin tuna in Australia; and several seaweeds in Japan. However, in Hawaii no commercial aquaculture lease had been granted under this statute due to severe

restrictions in the law that limited the type and scale of activities to research. Here in Hawaii, interest in moving aquaculture offshore had been growing as new, high value marine species, such as moi, became available from hatchery research and cage technology that can be purchased "off the shelf." This increasing interest prompted DLNR, administrator of state aquatic resources and submerged lands, and DOA, lead agency for aquaculture development, to re-examine Chapter 190D, HRS to remove key impediments and make the law more "user friendly." As a result, DOA in cooperation with DLNR, prepared and submitted Administration bills (S.B. No. 1321 and H.B. No. 984) to the 1999 Legislature to amend the ocean leasing law.

In 1999, the State Legislature took a far reaching step by passing S.B. No. 1321, S.D. 2, H.D. 2, C.D. 1, that allows potential utilization of marine resources for research and development of open ocean aquaculture. Former Governor Benjamin Cayetano on July 1, 1999 signed the bill into law as Act 176, Session Laws of Hawaii 1999.

The amendments to Chapter 190D, HRS, were as follows:

- a) clarify that mariculture is a sub-category of aquaculture that occurs in the marine environment;
- b) allow commercial mariculture as an allowable use under Chapter 190D, HRS;
- c) remove size restrictions on mariculture leases;
- d) define the water surface, water column and submerged lands beneath them as one economic unit for purposes of this chapter and calculating lease rent;
- e) subject to the Office of Hawaii Affairs' 20% entitlement, deposit revenues from leases into the Special Land and Development fund for purposes of aquaculture planning, research and development;
- f) allow processing of ocean leases under Chapter 190D, HRS without prior authorization of the Legislature by concurrent resolution;
- g) strengthen the law by requiring Conservation District Use Applications (CDUA) for ocean space to describe existing users of the proposed site;
- h) strengthen the law by having each lease describe the degree of exclusive use or access to the site by the public allowed;
- i) require that these amendments made to Chapter 190D, HRS, be repealed five years after the effective date of the Act, unless the Legislature authorizes an extension; and
- j) report each year to the legislature on progress made in implementing the law.

The first ocean lease to be issued was to Cates International, Inc. located about 1 mile off Ewa Beach, Oahu. Covering 4 suspended 40 feet below the ocean surface. The cages are stocked with juvenile fish (finfish aka moi) grown in tanks on land supplied by a hatchery. Their staff conducts daily maintenance, safety inspection of the cages and mooring system, environmental data collection and feeding operations.

Essentially, DOA/ADP is the State aquaculture lead agency. Facilitator and liaison between companies interested in obtaining ocean leases and the regulatory agencies. Assist companies in completing and packaging applications and holding initial Scoping Meetings. DLNR/OCCL/LD is the State agency responsible for determining environmentally acceptable resource uses via the CDUP process. Issues and manages the long-term ocean leases.

#### DISCUSSION:

Currently, staff manages two (2) ocean leases on behalf of ADP, but the revenues generated from all ocean leases are transferred to ADP.

In other words, Land Division was doing the work but retained no benefits. Recently staff met with ADP staff to discuss either (1) the leases should be transferred by Executive Order to ADP or (2) the 2 agencies entering into an agreement, compensating Land Division for managing current and future ocean leases.

Since ADP is a small agency, facing current and future budget cuts, it was decided the best mechanism would be Option #2.

The Attorney General's office has assisted us by conducting a preliminary review of the Memorandum of Agreement (Exhibit A). It is a draft and will be subject to further changes by either ADP staff, DOA's Deputy Attorney General or the Board of Agriculture. Therefore, we are recommending authority be granted to Chairperson to help us negotiate and finalize the Memorandum of Agreement.

At this time, we are managing only 2 ocean leases, they are:

Lease No.	Annual Rent	Estimate 25% Management Fee
GL #5654 Grove Farm Fish & Poi LLC	\$1,400	\$350
GL #5721 Kona Blue Water Farms, LLC	\$2,100	\$525

We did not include the percentage rent because it has been

fluctuating. The 25% management fee would apply to any percentage rents paid by the tenants.

RECOMMENDATION: That the Board:

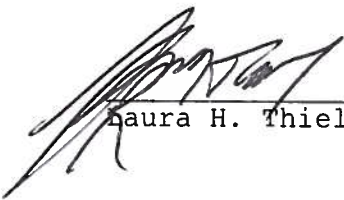
1. The Memorandum of Agreement is subject to Board of Agriculture approval.
2. Authorize the Chairperson to negotiate on behalf of the Department, and execute the Memorandum of Agreement.
3. Authorize the Memorandum of Agreement Between the Department of Land and Natural Resources and the Department of Agriculture on Behalf of the Aquaculture Development Program, subject to the following:
  - a. Review and approval by the Department of the Attorney General.

Respectfully Submitted,



Charlene E. Unoki  
Assistant Administrator

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
Laura H. Thielen, Chairperson

**DRAFT**

MEMORANDUM OF AGREEMENT  
BETWEEN THE STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
AND  
THE DEPARTMENT OF AGRICULTURE ON BEHALF OF THE  
AQUACULTURE DEVELOPMENT PROGRAM

THIS MEMORANDUM OF AGREEMENT is made and entered into on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the State of Hawaii, Department of Land and Natural Resources (DLNR) whose address is P.O. Box 621, Honolulu, Hawaii 96809-0621 and the State of Hawaii, Department of Agriculture (DOA), on behalf of the Aquaculture Development Program (ADP), a public body corporate and politic and an instrumentality and agency of the State of Hawaii, whose address is 1177 Alakea Street #400, Honolulu, HI 96813; to manage current and future ocean leases.

**I. RECITALS**

WHEREAS, this Agreement deals with ocean leases issued pursuant to Chapter 171 and 190D, Hawaii Revised Statutes, and within the management jurisdiction of DLNR.

WHEREAS, revenues obtained from the leasing of state marine waters pursuant to Chapter 190D, Hawaii Revised Statutes, shall be deposited into the special land and development fund to be used for planning, research, and development of the aquaculture industry.

WHEREAS, in response to ADP's recent lack of manpower and resources to manage current and future ocean leases, DLNR is willing to provide property management services for the ocean leases, until such time as ADP has adequate staffing and funding to manage those ocean leases on its own.

WHEREAS, the ADP and the DLNR desire to enter into an agreement under which the DLNR will manage the ocean leases on behalf of the ADP, in accordance with the terms and conditions set forth herein,

NOW, THEREFORE, the parties mutually agree as follows:

1. Effective Date. This Agreement shall be effective on \_\_\_\_\_.
2. Quarterly Statements. DLNR shall submit quarterly statements of receipts, disbursements, and charges, to the ADP at \_\_\_\_\_, or at such other address

# DRAFT

designated by ADP; and DLNR shall deposit quarterly the net proceeds resulting from DLNR's management of the ocean leases into the Aquaculture Development Program Special Fund, pursuant to \_\_\_\_\_, Hawaii Revised Statutes.

3. DLNR Services. DLNR agrees to provide the following services in managing the administration of any ocean leases obtained from and on behalf of the ADP:

- a. Advertisement. Advertise the ocean leases.
- b. Appraisal. Hire the appropriate appraiser/appraisal firm to determine the annual rent. Process rental reopenings and rental arbitrations.
- c. References. Check references of prospective tenants.
- d. Negotiation. Negotiate long term agreements (leases).
- e. Requests to renew or cancel. Handle requests to renew and/or cancel the existing long term agreements (leases) after obtaining directions or instructions from the ADP, and prepare new long term use agreements without additional charge to the ADP.
- f. Termination notice. Notify tenants that tenancies have been terminated (after obtaining the ADP's prior approval or otherwise confirming that a notice to terminate should be issued) and take such actions as may be necessary to terminate the tenancies, including serving or otherwise delivering such notices.
- g. Litigation preparation. Maintain, keep, collect, gather, and submit to the ADP such information and records on each tenant as may be necessary for the ADP to initiate legal actions, as deemed appropriate by the ADP, to (1) collect and recover rent, (2) evict tenants (if deemed appropriate by the ADP in consultation with the DLNR) and recover possession of the ocean lease, or (3) take such other actions as deemed necessary by the ADP (upon consultation with the DLNR).
- h. Submit information sufficient to make an informed decision. DLNR shall cooperate with the ADP to provide the ADP information and data upon which the ADP may make informed decisions on whether to settle, compromise, and/or release such actions, suits, or claims or reinstate such tenancies.
- i. Collection. Collect rents and/or assessments and other payments on the ADP's behalf as they become due. DLNR shall pay entitlements to the Office of Hawaiian Affairs.

# DRAFT

- j. Deposit funds collected. Deposit all funds collected under subparagraph 3i. above in the DLNR's special land and development fund.
- k. Handle security deposits. Handle tenants' security deposits and comply with all applicable laws concerning DLNR's responsibility for such deposits and interest thereon, if any.

4. DLNR Compensation. The ADP agrees to pay the DLNR a maximum of twenty-five percent (25%) of the monthly gross revenues collected from the ocean leases during the period of this Agreement. "Gross revenues" mean all funds collected from the operation of the ocean lease including percentage rents collected, but excluding tenants' security deposits and sums collected under paragraph 5. The remaining 75% of gross revenues, the ADP agrees to pay all expenses as defined under paragraph 6.

5. Additional Administrative Fees. DLNR shall collect from tenants the following: (a) interest on delinquent rents due at the rate of one percent (1%) per month plus a service charge of fifty dollars (\$50) a month for each delinquent payment, and (b) a returned check charge of twenty-five dollars (\$25). All sums collected hereunder are considered additional administrative fees payable to DLNR and shall not be payable to the ADP Special Fund.

6. Expenses. The DLNR may initiate emergency repairs as may be required due to danger or significant threat to life or property or that are immediately necessary for the preservation and safety of the ocean leases or the safety of the tenants and occupants thereon, or are required to avoid the suspension of any necessary services to the ocean leases upon notification to the ADP of the emergency situation and approval from the ADP to undertake the necessary repairs and to incur costs. The DLNR shall notify the ADP as soon as practicable regarding the emergency. The ADP shall appoint a duly authorized representative that will be on 24 hour call to address such emergency situations.

7. Transfer. In the event, ADP requests transfer of one or more ocean leases, the DLNR shall transfer the lease(s) to ADP by way of a Governor's Executive Order. Management services by the DLNR for a particular ocean lease shall terminate effective upon the execution and delivery of the Executive Order to the ADP. The ADP shall assume all management responsibilities for the ocean lease(s) that is/are subject to the Executive order. The DLNR shall provide the ADP with all relevant lease files, correspondence files, and accounting information for the lease(s) upon termination of the management services.

8. Accounting and Audit. At any time during the term of this Agreement and as frequently as the ADP deems necessary, the ADP may request that the DLNR provide an accounting of all of the revenues collected and operating expenses incurred during each fiscal year. The ADP may also request that an audit be performed by an independent certified public accounting firm on the financial results of the DLNR's management of the ocean leases.

# DRAFT

9. Dispute resolution. The DLNR and the ADP agree that if any disputes cannot be resolved between the staffs of the DLNR and the ADP, the Chairperson of the Board of Land and Natural Resources and the Chairperson of the Board of Agriculture shall together attempt to resolve the dispute. If the Chairpersons are unable to resolve the dispute, the dispute shall be submitted to the Governor for resolution.

10. Assignment. The DLNR shall not assign or transfer any of its interest or obligations to perform under this Agreement, to any entity, including any contractor or consultant retained by the DLNR, without the prior written consent of the ADP, which may be withheld at the ADP's sole discretion.

11. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of the ADP or the DLNR shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

12. Complaints. Warnings. The DLNR shall promptly notify the ADP or forward to the ADP any complaints, warnings, notices, or summons received by the DLNR relating to the ocean leases.

13. Cancellation. Either party may terminate all or a portion of this Agreement upon not less than 60 days prior written notice to the other party.

The undersigned parties hereby agree to abide by the terms and conditions of this Agreement.

IN WITNESS WHEREOF, the DOA on behalf of ADP, and the DLNR have executed this Memorandum of Agreement as of the date first above written.

Approved by the Board of Agriculture  
At its meeting held on

---

STATE OF HAWAII  
DEPARTMENT OF AGRICULTURE  
AQUACULTURE DEVELOPMENT  
PROGRAM

---

Its Chairperson

Approved by the Board of Land  
And Natural Resources at its  
Meeting held on

---

STATE OF HAWAII  
DEPARTMENT OF LAND AND  
NATURAL RESOURCES

---



**DRAFT**

Its Chairperson

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

Dated: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

Dated: \_\_\_\_\_